Lembaga Lebuhraya Malaysia v Sime Darby Plantation Bhd & Ors

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO B-01(A)-192–04 OF 2021
AZIZAH NAWAWI, NANTHA BALAN AND DARRYL GOON JJCA
22 APRIL 2022

Land Law — Acquisition of land — Compensation — Reference to court — High Court substituted compensation for injurious affection with award for severance — Whether High Court erred in its approach and application of test applicable in regard to landowners claim for severance compensation — Whether appeal raised any question(s) of law

This was an appeal by Lembaga Lebuhraya Malaysia ('LLM') against the whole of the decision of the learned judicial commissioner ('JC') in a land reference comprising several cases which were consolidated. The first and second respondents were the landowners ('landowners') that owned ten parcels of land ('the subject lots'). Part of the subject lots were acquired by LLM for a highway project ('the highway'). As a result of the acquisition of part of the subject lots, the remaining lots were separated into two with the highway running through. The consolidated land references were heard and the JC ordered, inter alia, that the third respondent's award be maintained, save for the award in respect of compensation for injurious affection which was set aside and substituted with an award for severance, payable at the rate of 2.5% of the market value in respect of the remaining unacquired land ('the decision'). It was this decision which was the subject of this appeal. Essentially, LLM contended that the landowners were not entitled to severance compensation as they did not fulfil the test enunciated in *Datuk Dr Murugasu Sockalingam & Anor v Superintendent of Lands and Surveys, First Division, Sarawak* [1983] 2 MLJ 336 ('*Dr Murugasu*'s case').

Held, dismissing the appeal:

(1) The entire remaining unacquired lands (and/or its agricultural potential) were in fact, negatively affected by the acquisition, in particular, in terms of estate management/operation. No doubt some of the additional expenses and costs had been allowed as part of the compensation during the acquisition hearing before the third respondent. But the fact remained that the estate was no longer what it used to be. The High Court was entitled to assess the extent of diminution in value by evaluating the evidence and made an award for severance compensation which it considered to be fair and reasonable, albeit one which was

relatively minimal. The presence of the highway (despite the construction of the Road Over Bridge and Road Under Bridge) would cause some adverse effect to the operation and management of the oil palm plantation and thereby negatively impact the open market value of the remaining unacquired lands (see paras 27, 35, 45 & 60).

(2) The award of 2.5% diminution in value was not contrary to *Dr Murugasu*'s case. The failure on the part of the landowners to fulfil the 'before-and-after' test (per *Dr Murugasu*'s case) only meant that there could be no award of any substantial damages as severance compensation, but it did not preclude the High Court from evaluating the evidence and undertaking an assessment of the extent of the diminution in value and making a minimal award which the High Court regarded as fair and reasonable in the circumstances to cater for severance compensation. As such, the High Court did not err in awarding a minimal amount of severance compensation at 2.5% of the land value (see paras 62 & 64–65).

(3) There was no question of law in this appeal which was in substance, an appeal touching on compensation. The appeal was accordingly precluded by the proviso to s 49(1) of the Land Acquisition Act 1960 (see para 67).

[Bahasa Malaysia summary

Ini adalah rayuan oleh Lembaga Lebuhraya Malaysia ('LLM') terhadap keseluruhan keputusan pesuruhjaya kehakiman yang bijaksana ('PK') dalam rujukan tanah yang terdiri daripada beberapa kes yang telah disatukan. Responden pertama dan kedua ialah pemilik tanah ('pemilik tanah') yang memiliki sepuluh petak tanah ('lot subjek'). Sebahagian daripada lot subjek telah diambil oleh LLM untuk projek lebuh raya ('lebuh raya'). Hasil daripada pengambilan sebahagian lot subjek, lot selebihnya dipisahkan kepada dua dengan lebuh raya berjalan diantaranya. Rujukan tanah yang disatukan telah didengar dan PK memerintahkan, antara lain, bahawa award responden ketiga dikekalkan, kecuali award berkenaan dengan pampasan untuk injurious affection telah diketepikan dan digantikan dengan award untuk severance, yang dibayar pada kadar 2.5% daripada nilai pasaran berkenaan dengan baki tanah yang belum diambil ('keputusan'). Keputusan inilah yang menjadi subjek rayuan ini. Pada asasnya, LLM berhujah bahawa pemilik tanah tidak berhak mendapat pampasan severance kerana mereka tidak memenuhi ujian yang dinyatakan dalam *Datuk Dr Murugasu Sockalingam & Anor v Superintendent of Lands and Surveys, First Division, Sarawak* [1983] 2 MLJ 336 ('kes *Dr Murugasu*').

Diputuskan, menolak rayuan:

(1) Keseluruhan tanah yang masih belum diambil (dan/atau potensi pertaniannya) sebenarnya, terjejas secara negatif oleh pengambilan,

khususnya, dari segi pengurusan/operasi ladang. Tidak dinafikan beberapa perbelanjaan dan kos tambahan telah dibenarkan sebagai sebahagian daripada pampasan semasa pendengaran pengambilan di hadapan responden ketiga. Tetapi hakikatnya tetap bahawa estet itu tidak lagi seperti dahulu. Mahkamah Tinggi berhak menilai sejauh mana pengurangan nilai dengan menilai keterangan dan membuat award untuk pampasan severance yang dianggap adil dan munasabah, walaupun yang agak minimum. Kehadiran lebuh raya (walaupun pembinaan *Road Over Bridge* dan *Road Under Bridge*) akan menyebabkan beberapa kesan buruk kepada operasi dan pengurusan ladang kelapa sawit dan dengan itu memberi kesan negatif kepada nilai pasaran terbuka bagi baki tanah yang belum diambil (lihat perenggan 27, 35, 45 & 60).

(2) Award pengurangan nilai 2.5% tidak bertentangan dengan kes *Dr Murugasu*. Kegagalan pemilik tanah untuk memenuhi ujian 'sebelum-dan-selepas' (seperti kes *Dr Murugasu*) hanya bermakna bahawa tiada sebarang ganti rugi besar boleh diberikan sebagai pampasan severance, tetapi ia tidak menghalang Mahkamah Tinggi daripada menilai bukti dan menjalankan penilaian sejauh mana kekurangan nilai dan membuat award minimum yang dianggap oleh Mahkamah Tinggi sebagai adil dan munasabah dalam keadaan untuk memenuhi pampasan severance. Oleh yang demikian, Mahkamah Tinggi tidak terkhilaf dalam memberikan amaun minimum pampasan *severance* pada 2.5% daripada nilai tanah (lihat perenggan 62 & 64–65).

(3) Tiada persoalan undang-undang dalam rayuan ini yang pada hakikatnya, rayuan menyentuh pampasan. Rayuan itu sewajarnya dihalang oleh proviso kepada s 49(1) Akta Pengambilan Tanah 1960 (lihat perenggan 67).]

Cases referred to

Amitabha Guha (as beneficiary for the estate of Madhabendra Mohan Guha) v Pentadbir Tanah Daerah Hulu Langat [2021] 4 MLJ 1, FC (refd)

Collector of Land Revenue v Alagappa Chettiar [1971] 1 MLJ 43; [1968] 1 LNS 31, PC (refd)

Datuk Dr Murugasu Sockalingam & Anor v Superintendent of Lands and Surveys, First Division, Sarawak [1983] 2 MLJ 336; [1983] 1 LNS 30, FC (refd)

Pentadbir Tanah Daerah Johor v Nusantara Daya Sdn Bhd [2021] 4 MLJ 570; [2021] 5 AMR 769; [2021] AMEJ 0701; [2021] 7 CLJ 1, FC (refd)

Legislation referred to

Land Acquisition Act 1960 s 49(1), First Schedule, para 2(c), (d), Third Schedule, paras 2(1), 5

Koh Yew Chong (with Justin Leong Chee C'Jun and Chong Kar Man) (Lee & Koh) for the appellant.

Kok Su Ann (with Raneesha Thayalan and Isabella Cheah Chooi Mun) (Zain & Co) for the first and second respondents.
Etty Eliany Tesno (with Amelia Masran) (Selangor State Legal Advisor's Office) for the third respondent.

Nantha Balan JCA (delivering judgment of the court):

[1] This is an appeal by Lembaga Lebuhraya Malaysia ('LLM') against the whole of the decision of the learned judicial commissioner ('JC') given on 18 March 2021 in a land reference comprising several cases which were consolidated pursuant to an order dated 18 December 2019 made in Shah Alam High Court Land Reference No BA-15–26–02 of 2019.

[2] The first and the second respondents are the landowners ('landowners'). The third respondent is the land administrator. The landowners owned ten parcels of land ('subject lots') with a combined land area of 12,671,250.93 sqmt. The subject lots were contiguous to each other and were used as oil palm plantations. Part of the subject lots were acquired by LLM for a highway project known as 'Projek Lebuhraya Persisiran Pantai Barat (LPB) dari Persimpangan Assam Jawa-Persimpangan Tanjung Karang, Pakej 7 (Part 1), Daerah Kuala Selangor, Selangor' via Selangor Government *Gazette* No 4809 dated 9 December 2016 ('Highway').

[3] The land area that was acquired was 626,794.06 sqmt or 4.9% of the total land area. As a result of the acquisition of part of the subject lots, the remaining lots were separated into two (Portion A and Portion B) with the Highway running through. Following from the said severance, the remaining lands, ie, Portion A and Portion B have each an area of 405.4939 hectares and 798.9446 hectares respectively.

[4] On 18 March 2021, the consolidated land references were heard and the JC ordered, inter alia, that the third respondent's award be maintained, save for the award in respect of compensation for injurious affection which was set aside and substituted with an award for severance, payable at the rate of 2.5% of the market value in respect of the remaining unacquired land (11,986,58 sqmt) in the sum of RM13,844,505.68 ('decision'). It is this decision which is the subject of this appeal.

[5] The key issue in this appeal is whether the High Court, which sat as a land reference court, had erred in its approach and application of the test applicable in regards to the landowners' claim for severance compensation.

[6] Essentially, LLM contended that the landowners were not entitled to severance compensation as they did not fulfil the test enunciated by the Federal

Court in *Datuk Dr Murugasu Sockalingam & Anor v Superintendent of Lands and Surveys, First Division, Sarawak* [1983] 2 MLJ 336; [1983] 1 LNS 30 (FC) ('*Dr Murugasu*'s case'). A

[7] Fundamentally, it was LLM's position that the JC had erred in granting compensation for severance when: B

(a) the landowners had allegedly failed to provide any evidence of the value of the unacquired portions of land prior to and after the acquisition, as set out in *Dr Murugasu*'s case;

(b) the landowners had allegedly failed to prove that the potential of the unacquired portions was and would be affected by the acquisition, as required by *Dr Murugasu*'s case; C

(c) the JC had allegedly adopted an incorrect method of assessment of damages for severance by using the total area of the unacquired portions which were, allegedly, unaffected by the acquisition; and D

(d) the JC had failed to substantiate her decision as to how or why the landowners could still suffer severance (if any) in light of the undertaking by LLM and/or West Coast Expressway Sdn Bhd to construct four road over bridge ('ROB') and two road under bridge ('RUB'). E

[8] It is of course axiomatic that there can be no appeal on an award of compensation and, in order to maintain an appeal, LLM must demonstrate that there are question(s) of law and that the question(s) is/are not one that 'comprises an award of compensation'. See: the proviso to s 49(1) Land Acquisition Act 1960. F

[9] In *Pentadbir Tanah Daerah Johor v Nusantara Daya Sdn Bhd* [2021] 4 MLJ 570; [2021] 5 AMR 769; [2021] AMEJ 0701; [2021] 7 CLJ 1 (FC) ('Nusantara Daya') the Federal Court held [58] that the proviso to s 49(1) must be 'narrowly and strictly construed'; that the definition must not be extensive as it would undermine the clear intent of the proviso to s 49(1) — that there is *no right of appeal in respect of decisions comprising 'an award on compensation*'. G

H

[10] It was contended on behalf of LLM that the instant appeal is not about compensation, rather it has to do with the application of the proper test to determine the landowner's entitlement to severance compensation pursuant to the decision in *Dr Murugasu*'s case.

I

[11] In substance, it was LLM's argument that the landowners are not entitled to any compensation for severance as their valuer had failed to apply the before-and-after test in claiming severance damages at the rate of 50% (per *Dr Murugasu*'s case).

[12] Counsel for LLM referred to the decision of the Federal Court in *Amitabha Guha (as beneficiary for the estate of Madhabendra Mohan Guha) v Pentadbir Tanah Daerah Hulu Langat* [2021] 4 MLJ 1 (FC) ('Amitabha') and maintained that the High Court's failure to apply the correct legal test as well as the finding of facts in the absence of evidence, are appealable questions of law.

[13] It was also contended that the test in *Dr Murugasu*'s case was not considered by the JC in deciding whether the remaining lands had diminished in value by 2.5%. As such, the JC's failure to consider or apply the test in *Dr Murugasu*'s case gave rise to an appealable error of law.

[14] In amplification, it was argued for LLM that the landowner's valuer (Iskandar Associates) had opined that the diminution in land value was 50%, but there was no explanation to justify why this percentage was chosen. This question was unanswered and there was no evidence from which any such conclusion could be inferred.

[15] Counsel for LLM emphasised that the JC had found that the landowner's claim for 50% was 'tidak munasabah dan terlalu tinggf and had rejected the same. And the landowners did not appeal against the said rejection and were quite content with the award of severance compensation of 2.5%.

[16] It was therefore contended that the landowners had also implicitly conceded to the JC's finding that their valuer's assessment of a 50% diminution in value was too high and was unreasonable as they did not file any appeal or cross-appeal to pursue their claim for 50%. In the result, counsel for LLM reiterated that, the before and after test in *Dr Murugasu*'s case (p 340 (MLJ)) must be applied to determine whether there is any diminution in value and if so, the amount. We turn now to *Dr Murugasu*'s case.

Dr Murugasu's case

[17] In *Dr Murugasu*'s case, the landowner's claim for substantial compensation for diminution in value for injurious affection and severance for Lot 614 was rejected. The Federal Court observed that 'before the Superintendent the appellants' valuer did not specify the amount for severance and injurious affection'. The discussion on the claim for severance and injurious affection was noted in the following passages in that case (p 339 (MLJ)):

> The learned judge rejected the substantial claim for diminution of value due to severance and injurious affection and the contention of the objectors' valuer that an area of approximately 12.35 acres would be rendered totally useless as the land

happened to be in the flight path of incoming and outgoing aircraft as he found no reliable evidence to support such a contention.

It was not in dispute that the remaining portion of Lot 614 had the potentiality of being developed for housing purposes but that such potentiality was not yet ripe at the material date. The reason was that residential lots along Airport Road and Penrissen Road near the subject land had not yet been developed by 1972.

Although the valuers from both sides did not dispute this potentiality they disagreed on the time factor for the potentiality to emerge. For these reasons the learned judge was perfectly right to stress that despite the severance, the potentiality of the remaining portion of the subject land was not and did not seem to have been affected.

The question of injurious affection found some support from the learned judge, because after acquisition of a portion of Lot 614, the frontage of the subject land was reduced by slightly less than one-third in length. Despite this, the remaining area still retains and possesses a very substantial frontage into Penrissen Road and would still be viable for development as a self-contained housing estate.

[18] In that case, despite taking the view that diminution in value of the remaining land due to severance was not established, the High Court *proceeded to award compensation for injurious affection calculated at 5.0% of the value of the acquired land* (rather than the remaining land). The Federal Court dismissed the landowner's appeal and affirmed the High Court's decision. Lee Hun Hoe CJ (Borneo) stated (p 339 (MLJ)):

From the above the learned Judge inferred that the Superintendent refused to pay compensation for injurious affection for reason which could not be supported in law. He therefore decided to award an additional 5% for damages for injurious affection citing in support a passage from the Indian case of *Gajanan Vinayak v Assistant Collector* AIR 1924 Bom 54 55. The passage reads:

> ... It has been contended that by reason of the Government acquiring a part of the frontage of the land belonging to the claimant, *the land behind the plot acquired would, by reason of such acquisition, be injuriously affected.* That may be the case. *The Judge has taken that into consideration in the amount that he has awarded, by adding 5 per cent and we do not think there is anything unfair in that excess.*

The learned Judge upheld the award of the Superintendent of $30,000 per acre for Lot 331 and $25,000.00 per acre for the portion of 10.54 acres from Lot 614. *In addition he awarded 5% for injurious affection under section 60(1)(c) of the Land Code in respect of Lot 614. This came to $13,175.00.* The total amount is $340,875.00. He ordered each party to pay his own costs.

Appellants contended that the learned judge erred in law when he related his award of an additional 5% for damages for injurious affection to the value of the portion of Lot 614 acquired instead of to the value of the remaining portion of Lot 614. They maintained that the two assessors in fact awarded the 5% depreciation on the value of the remaining portion of Lot 614. There is no merit in this ground.

A ...

Where a claim is made involving diminution in value *it is essential to have two valuations relating to the appellants' other land, namely, one the market value immediately prior to acquisition of the land and the other immediately after acquisition.* The difference between the two valuations may be taken as representing the extent
B of the injurious affection relating to diminution in value of the remaining land.

Claims relating to severance and injurious affection are often difficult to substantiate. In the present case it is even more so on the particular facts. To succeed a *valuer must quantify such damages realistically and convincingly.*

C *In determining a claim for injurious affection, a valuer should examine all the probable consequences of the acquisition in so far as they affect the owner's other land.*

Any damage sustained or likely to be sustained by the owners must be properly assessed. *Quantification of damages should, as in the case of severance, be on a basis which can be supported by evidence.* The learned judge clearly rejected the valuation of the appellants' valuer.
D

[19] Ultimately, the High Court in *Dr Murugasu*'s case declined to award any severance compensation for the remaining portion of Lot 614, but proceeded to award 5% as an additional award but this was based on the
E acquired portion of Lot 614. This part of the award was upheld by the Federal Court.

[20] Before us it was submitted that the JC had erred in awarding 2.5% severance compensation as the landowners' valuer had not complied with the
F test laid down in *Dr Murugasu*'s case, namely the 'before and after valuation' of the remaining parts of the subject lots.

[21] Therefore, there was no basis for the High Court to decide on the question of severance compensation. It was submitted for LLM that 2.5% of
G the remaining parts of the subject lots totalling RM13,844,505.68 was not justified as it was a percentage that was 'plucked from the air'.

[22] In response the landowners relied on the opinion rendered by their valuer, Messrs. Iskandar Associates who had opined that the acquisition had
H negatively impacted the management/operation of the estate as a whole, in respect of, inter alia, the following:

(a) loss of direct/convenient access;

(b) difficulty in transportation of materials/yields and/or increase in time
I and costs for the same;

(c) loss of 'economies of scale'/'compact holding' in the management of the remaining lands;

(d) reduction of productivity; and

(e) increase in time and costs of estate management.

[23] The landowners' valuer said there would be a negative impact even though there were undertakings given by LLM that it would build a Road Over Bridge ('ROB') and a Road Under Bridge ('RUB'). The said valuer opined that these undertakings were not-satisfactory, insufficient and/or inadequate to place the landowners in the same position prior to the acquisition of the subject lots. Therefore, it was the opinion of the Landowner's valuer that the claim and/or award for severance is justified.

[24] The said valuer put the severance compensation at RM851,047,535 as they were of the view that the entire remaining unacquired lands (and/or its agricultural potential) were in fact, negatively impacted by the acquisition, in particular, in terms of estate management/operation. The High Court agreed with the said valuer in terms of the *adverse effect and impact* on the remaining lands.

[25] The private assessor also opined that there was some adverse effect and was of the view that a low or minimal value of 2.5% should be given as compensation for severance.

> Saya bersetuju dengan Penilai Swasta yang berpendapat adalah tidak munasabah dengan kenyataan JPPH yang menyatakan tidak terdapat kesan pecah pisah dan kesan mudarat ke atas ladang berkenaan, apatah lagi ladang berkenaan adalah nyata telah terpisah kepada dua bahagian kesan dari pembinaan laluan lebuhraya tertutup.
>
> Walaupun JPPH dan Penilai Pencelah menyatakan pihakagensi telah bersetuju dan berjanji akan membina 'two road under bridge dan 4 road over bridge' dan juga '14 culvert crossing' bagi sistem pengairan sebagaimana Pelan Akses dan Peian Pembinaan Culvert Crossing yang disediakan oleh pihak West Coast Expressway Sdn. Bhd. Saya berpendapat ianya sekadar dapat mengurangkan kesan pecah pisah dan kesan mudarat sahaja, tetapi ianya tetap tidak sama seperti sebelum berlakunya pengambilan ini.
>
> Saya cadangkan kadar pampasan 2.5% untuk kesan pecah pisah dan kesan mudarat ke atas baki tanah Ladang Berkenaan/Ladang Bukit Talang atas alasan terpisah kepada dua bahagian.'

[26] The JC agreed with the private assessor. The JC's approach to the issue of severance compensation may be seen from the following parts of the grounds of judgment:

> [44] Kadar pelarasan yang disyorkan oleh Penilai Tuan Punya Tanah adalah ... Tuntutan adalah atas alasan Lot Subjek akan *menanggung kos akibat kerosakan tanah dan kerugian berkaitan dengan kadar pulangan dan pengurusan ladang.*
>
> [46] Pihak Pentadbir Tanah telah mengawardkan pampasan untuk pecah pisah dan kesan mudarat bersekali untuk sejumlah RM1,258,282.14. Walau bagaimanapun,

mahkamah mendapati Pentadbir Tanah telah mengawardkan pampasan bagi kesan mudarat atas kerosakan yang ditanggung ataau mungkin ditanggung disebabkan oleh pengasingan tanah itu ke atas lima lot tanah bersaiz kecil yang dikatakan terkesan dengan pengambilan ini sahaja. Mahkamah berpandangan bahawa memandangkan lot subjek adalah tanah ladang, mengikut s 214A, ia hendaklah diambilkira secara keseluruhan dan bukan lot-lot tertentu sahaja.

Di sini, *mahkamah bersetuju dengan pandangan Pengapit Swasta yang mengatakan bahawa pandangan pakar iaitu pengurus ladang hendaklah diberi pertimbangan. Mengambilkira laporan Penilai Tuan Punya Tanah, mahkamah ini berpandangan di atas dasar keseimbangan, pampasan wajar diberikan atas pecah pisah dan kesan kemudaratan tetapi sebanyak 2.5% sahaja bagi keseluruhan tanah Lot Subjek.*

[48] ... Walau bagaimanapun, mahkamah maklum bahawa *terdapat keperluan untuk membuat beberapa perubahan dari aspek pengurusan ladang.* Oleh itu *mahkamah berpendapat kadar 2.5% untuk keseluruhan Lot Subjek adalah berpatutan dan munasabah diawardkan untuk kemudaratan yang akan dialami ...*

[27] Having examined the matter comprehensively, there is in our view, no doubt at all that the entire remaining unacquired lands (and/or its agricultural potential) were in fact, negatively affected by the acquisition, in particular, in terms of estate management/operation. The suggestion by LLM's valuer that there was no impact and therefore no diminution in value of the remaining lands defies both logic and reason.

[28] As a matter of principle, a claim for severance and injurious affection is based on the damage sustained or likely to be sustained by the person interested at the time of the land administrator's taking possession of the land, by reason of the acquisition injuriously affecting his other or remaining property. The basis of the claim for severance and injurious affection is in fact laid out in Schedule 1, s 2(c) and s 2(d), where compensation is payable for damages and injury to remaining property due to an acquisition.

[29] In this regard, the landowners' valuer had given a detailed explanation. In reaching their conclusion, they had also considered the views of the estate manager. In their opinion, the remaining lands would suffer a diminution in value of 50%.

[30] The pre-acquisition value of the subject lots was stated to be RM1,420,00 per hectare whereas the post-acquisition value was given as RM710,000 per hectare. Thus, severance compensation was given at RM851,047,535.

[31] Of course, this figure represents a very substantial claim for severance compensation. As posited by the Federal Court in *Dr Murugasu*'s case, the

quantification of damages should be on a basis which can be supported by evidence.

[32] In this regard, Iskandar Associates appear to have fallen short as they did not provide any evidence of valuation of estate lands which are similarly circumstanced as the remaining unacquired lots, ie with a Highway passing through the two remaining parts of the palm oil plantation.

[33] Be that as it may, the question still remains — was there damage in terms of diminution in value to the remaining parts of the subject lots?

[34] It is clear that the Highway would be an impediment to the running and administration of the estate as a whole. Whilst LLM gave its undertaking to construct the ROB and RUB to alleviate the logistical impediments created by the presence of the Highway over what used to be one continuous unhindered estate, there is now a huge physical obstruction which separated the estate into two parts. This will necessitate additional costs and expenses in the operation and management of the remaining estate.

[35] No doubt some of these additional expenses and costs have been allowed as part of the compensation during the acquisition hearing before the third respondent. But the fact remains that the estate is no longer what it used to be, and it takes very little to convince any reasonable tribunal that there will be some adverse effect on the value of the remaining unacquired land.

[36] LLM's valuer (Exastrata Sdn Bhd) repudiated the suggestion of any diminution in value of the remaining lands. They said that the remaining lands were large and operational. Hence, there is no impact to its potentiality and accordingly there is no diminution in value. They said:

> We are of the opinion that although all the ten (10) parcels of the Scheduled Lands are severed into two (2) separate parcels due to the acquisition, all the remaining portions of land have adequate land area for future development.
>
> We also noted that the Scheduled Lands are still accessible and according to West Coast Expressway Sdn Bhd, they have agreed to provide Road Over Bridge (ROB) and Road Under Bridge (RUB) at certain locations to connect the severed portions to the others As per the technical Drawings, two (2) RUBS and four (4) ROBS will be constructed at the agreed locations. The crossings will allow access for traffic to pass under and over the bridge to cross the highway main line.
>
> The Technical Drawings for the RUBS and ROBS are attached as Appendix G1.
>
> Based on the information obtained from West Coast Expressway Sdn Bhd, they have also agreed to provide good drainage system with construction of irrigation main trunk and culvert to prevent flooding to the Scheduled Lands (as per Technical Drawings Bearing Ref. No.: WCE/S7/CN/DG/3110, 3111 & 3112).

The Technical Drawings for the drainage are attached as Appendix G2.

Based on the aforementioned findings, we are, therefore, of the opinion that generally there will be no depreciation in value to the remaining land. Thus, the claim for severance and injurious affection should be dismissed.

[37] However, the landowners' valuer, Iskandar Associates stated otherwise. They said:

3.0 Claims for severance and injurious affection should not have been rejected

In our view, the Respondent valuer has unreasonably rejected the claims by the land owner for severance and injurious affection, for the following reasons:

The damages suffered by the oil palm plantation due to the construction of the Expressway are real, can be easily validated on site and are not made-up, or contrived.

With due respect, the person best qualified to advise on the impact of severance on the operations of the oil palm plantation is not the valuer, but the estate manager. We have been advised in detail by the Estate Manager of the Bukit Talang Estate on the negative impact of the construction of the Expressway across the oil palm estate.

The estate manager has listed the damages to the estate and accommodation works required to be done due the construction of the Expressway splitting the subject property into two pieces of land, which we have listed in our report.

According to the estate manager, the severance and injurious affection of the subject property due to the splitting of the land parcel into two parts, are as follows:

Drains

New drains have to be constructed to replace the ones disrupted by the building of the highway, while some drains would have to realigned or diverted.

Some of the drains that are critical to flood management of the estate have been blocked or damaged because they lie in the path of the Expressway and would have to be replaced. Some have to be relocated, while other drains have to realigned or diverted. According to the estate manager, the drains affected include the large drains, perimeter drains, desilting main drains, collection drains and closed drains.

Several items related to the drainage system in the estate would also have to be replaced because they have been damaged or made obsolete by the construction of the highway. The items are as follows:

1. Flap gates
2. Screw gates
3. Pump house
4. Culverts
5. Bund heightening

Roads, Service Roads and Underpass

New internal roads have to be constructed to replace the ones destroyed by the highway, including supervision roads, main roads and collection roads for tractors taking the fruits.

To clear the route, cut the trees and prepare the land for the construction of the new drains and internal service roads as above, a number of oil palm trees on land that are not acquired, would have to be cut down.

Unlike before the acquisition when their access to the whole estate was unhindered, underpass or similar forms of access have to constructed by estate management to enable the tractors access to the other side of the closed Expressway.

Operational costs to collect the fruits post-acquisition would also increase because the tractors would have to travel a longer route from the other side of the highway to the oil palm mill on this side of the highway.

Summary

The accommodation works have to be done, and in fact, are already being carried out by the management of the estate to mitigate the operational difficulties that result from the partitioning of the land parcel into two large pieces of land.

To put the landowner back in the same position as he was before the acquisition, (pursuant to the Principle of Equivalence in Land Acquisition compensation), we are of the view that all the costs of accommodation works to repair the damages caused to the estate by the acquisition, and the losses of oil palm trees that are cut to replace the ones lost due to the highway, are claimable and should not have been rejected by the Respondent valuer because they are actual, are being mitigated by estate management and are not contrived.

4.0 The view that severance claims are not justified for large residual plots is wrong

The view offered by the Respondent valuer as to why he has not compensated the landowner for severance and injurious affection, even though the working oil palm plantation is split into two parts by a closed Expressway, is in my view not reasonable. The Respondent valuer opines that since the residual size of the two split parts of the subject property is still large (even though he has omitted to define what is large, or what is small, in the context of an oil palm estate), the estate land will not suffer a negative impact from the severance because the parcels are still large enough to be 'developed'.

We do not agree with this view, since in our opinion, the damage caused by severance of land due to a land acquisition is not dependent on the size of the residual land that results from the severance, but rather, is determined by the amount of damage caused to the residual land post-acquisition, regardless of whether the remaining land is large or small.

In other words, even when an acquisition splits a large oil palm estate into two very large parcels of land as residual plots, claims for severance and injurious affection are still payable if the remaining land suffers damage due to the severance. Size does not come into it. That is what section 2(c) of the First Schedule of the Land Acquisition Act provides:

In determining the amount of compensation to be awarded for any scheduled land acquired under the Act, there shall be taken into consideration the following matters and no others ...

(c) the damage, if any sustained or likely to be sustained by the person interested at the time of the Land Administrator's taking possession of the land by reason of severing such land from his land.

It can be seen that nowhere in the First Schedule of the Land Acquisition Act 1960 does it say that claims for severance and injurious affection are not valid if the remaining land sizes are large.

It also does not say, as the Respondent valuer opines, that if the size of the remaining land is still large enough to be developed, then the claim for severance and injurious affection should be rejected.

Summary

In evaluating the claims for severance and Injurious affection, what is relevant is not the size of the remaining land but the amount of damage sustained to the remaining land due to the severance, as clearly provided under section 2(c) of the First Schedule of the Land Acquisition Act 1960.

The basis of the severance claim, as stated in the Act, is the 'damage due to the severance of the scheduled land from his other land'. Given that the subject property will be severed by an Expressway cutting across the land, the landowner will be faced with managing a plantation that is now physically separated by a major closed road.

It is on this basis that the landowner is claiming. Detailed information about the damage caused by the severance of the land on the roads and drains of the fully operational plantation form the basis of the claim.

Case law also supports this view.

In *Boustead Estates Agency Sdn Bhd v Pentadbir Tanah Baling* (2007) CU 375, the claim for severance and injurious affection was upheld by the Court, even though the remaining portion were large parcels of land. In the above case, the Court awarded for cost of fencing the property.

[38] We turn now to the problem. If the landowners desired to seek substantial severance compensation, then their valuer ought to have placed sufficient evidence to prove on a balance of probabilities that post-acquisition, the remaining lands can only be sold in the open market at a discount of 50% (or other applicable rate) of its pre-acquisition open market value.

[39] As stated earlier, this was not done. And the High Court rightly rejected the valuation of RM851,047,535 as severance compensation. But that is not the end of the matter. There is still the question of the adverse effect on the remaining lands.

[40] And the issue is whether, as contended by LLM, there should be zero (nil) severance compensation, or alternatively, as opined by the High Court, there should be a minimal award of severance compensation.

[41] In this context, it is important to appreciate that in *Dr Murugasu*'s case, despite there being no 'pre and post' valuation evidence on compensation for severance and injurious affection, and despite the High Court having rejected the substantial claim for injurious affection, the landowner was nevertheless awarded 5%, as additional compensation for injurious affection, but this was based on the land area of the acquired lot and not the remaining lots. This was regarded as a 'fair' outcome.

[42] Here, the JC agreed with Iskandar Associates that the Highway had an adverse effect on the management and operation of the remaining lands and therefore there would be some diminution in the value of the lands. But the JC found the 50% diminution to be too excessive and unreasonable. In our view, rightly so.

[43] The JC took the view that it would instead be fair and reasonable to award severance compensation based on 2.5%. In this regard, the JC agreed with the private assessor who was of the view that there was an adverse impact on the remaining lands and that diminution in value based on 2.5% was fair and reasonable.

[44] But counsel for LLM said that the JC acted on a whim without any evidence. In this regard it is important to note that the High Court sitting in Land Reference proceedings is entitled to consider the advice proffered by the assessors and to make its own estimate of the amount of compensation based upon the evidence that was presented.

[45] On that premise, we are of the view that based on all the circumstances attendant upon the claim and the evidence provided, the High Court was entitled to assess the extent of diminution in value by evaluating the evidence and make an award for severance compensation which it considered to be fair and reasonable, albeit one which was relatively minimal. In this regard, we refer to the case of *Collector of Land Revenue v Alagappa Chettiar* [1971] 1 MLJ 43; [1968] 1 LNS 31 (PC) where Lord Diplock (p 44 (MLJ)) said:

> ... The judge, with the assistance of the advice proffered to him by the assessors, *makes his own estimate of the amount of compensation upon the evidence adduced before him; ...*

[46] It is appropriate at this juncture to perhaps deal with the issue whether the appeal raises any question(s) of law. In this respect, it is clear that the High Court has a wide discretion as to how it should deal with the evidence that is presented. Thus, issues such as the percentage of deductions to be made, the choice of comparable properties, rates or percentages to be used etc are all issues or considerations which go towards the computation process in arriving at the compensation to be awarded. They are not questions of law.

A **[47]** It was also argued that the landowners' valuer's reports had not made out a 'prima facie' case for compensation (para 2(1) of the Third Schedule of the Land Acquisition Act 1960) and that the valuer's reliance on the input by the estate manager was inadmissible as the latter's opinion should have been tendered via an affidavit (para 5 of the Third Schedule of the Land Acquisition
B Act 1960).

[48] In our view, the question as to whether a prima facie case had been made out or not, is a matter of impression and evaluation by the High Court sitting
C as a Land Reference Court. Here, the landowners' valuer had stated the pre-acquisition value at RM1,420,000 per hectare and the post-acquisition value at RM710,000 per hectare.

[49] Whilst the High Court may have rejected the quantitative aspect of the
D valuation as being excessive and unreasonable, the reports nevertheless had established the Highway's adverse effects on the remaining parcels of land.

[50] That part of the valuation reports is unimpeachable as the subject lots were as a matter of fact partitioned or separated by the Highway and it accords
E with reason and common sense that this would necessarily have a deleterious effect on the management of the remaining, but dissected, lands.

[51] Indeed, the High Court had accepted that there were adverse effects on
F the remaining parcels of unacquired land. The High Court just did not accept the valuation for severance compensation with a 50% diminution equal to RM851,047,535. The High Court made its own estimation and decided to award 2.5% which amounted to RM13,844,505.68.

G **[52]** Thus, whether the valuation report establishes a prima facie case or not, is a matter of evidence and the weight to be given to such evidence. It does not qualify as a question of law.

[53] And as for the opinion of the estate manager, it is our view that it was
H perfectly acceptable for a valuer to elicit the opinion of a professional such as an estate manager to obtain his views on matters such as the impediments that will be occasioned by the presence of the Highway which divided the subject lots. It thus cannot be said that the valuer's opinion was without the benefit of any informed and professional input.
I

[54] Of course, there may well be situations where the opinion of a non-valuer is to be separately adduced during the Land Reference proceedings in which case it has be introduced via an affidavit. But this was not such a case.

[55] Here, the evidence was that of the valuer, in the form of the valuer's opinion. The valuer's reliance on inputs given by the estate manager does not necessitate a separate affidavit by the estate manager. The valuation and opinion expressed was that of the valuer based on, inter alia, the professional views of the estate manager as to the impediments and difficulties that will arise and the impact on the management and administration of the estate due to the presence of the Highway.

[56] The views of the estate manager are not akin to an opinion on the value of the land. Rather, they were material of a relevant and pertinent kind that would enable the valuer to arrive at a conclusion and to opine on the value of the remaining lands.

[57] Ultimately, it is the valuer who quantified the value of the claim for severance compensation. Thus, we do not see how the valuer's valuation can be impeached or impugned merely because the report contained references to input that was given by the estate manager. In short, the landowners' valuer had formed his opinion after an assessment of factors which in his view, would have a material effect on the valuation. We would add that there was also no evidence to suggest that no such consultation with the estate manager took place or that the estate manager's views were contrary to that reported by the valuer.

[58] It is trite that there can be no appeal on issues relating to compensation (see: proviso to s 49(1) Land Acquisition Act 1960). Thus, a party which seeks to prosecute an appeal to this court must demonstrate that there is/are question(s) of law (per *Amitabha*'s case) and appeals touching upon compensation are not permissible.

[59] Thus, issues which are dressed up as questions of law, but are in pith and substance, appeals on compensation, are precluded by virtue of the proviso to s 49(1) of the Land Acquisition Act 1960. The statutory strictures, restriction and narrow scope for appeal was made clear by the decision of the Federal Court in *Nusantara Daya* (paras 79, 81 and 82):

> [79] The High Court, as a land reference court was entitled to make those deductions for the reasons stated, as those *deductions are very much fact-based decisions, based on evidence adduced, the analysis of such evidence involving the court's appreciation and impression of such evidence when applying principles of valuation to the facts. Room must be given for a divergence of opinion on the evaluation of such evidence; more so when the appeal is statutorily limited.*
>
> [81] The *allegations of acting without evidence or acting against the evidence of a particular witness or report; or how a particular piece of evidence is to be treated, as raised in the questions posed, are actually complaints* generally made in order to meet the general principles for appellate intervention. The views expressed by Michael Barnes in *The Law of Compulsory Purchase and Compensation* and by Lord Denning

MR in *Ashbridge Investments Ltd v Minister of Housing and Local Government* [1965] 1 WLR 1320, that *such complaints are points of law which may be raised on appeal and for which reasons the appellate court may interfere in the trial court's findings, is generally correct in the context and in relation to appeals sans the proviso to s 49(1).*

But for the clear terms of the proviso, such appeals on points of law may be entertained even if the appeal is on compensation or the amount of compensation.

However, *in the presence of the plain terms of the proviso, and the restrictive reading which we must give to the meaning of question of law as allowed in Semenyih Jaya, such complaints or grounds do not render or make the questions posed, questions of law.*

[82] We are of the firm view that the *complaints of the respondent essentially concerned issues of fact and/or application of valuation principles when computing the amount of compensation to be awarded for the acquisition.*

Such issues of fact as well *as the application of valuation principles as we have said repeatedly, are not questions of law; certainly not within the narrow and limited remit of what or how such a question of law may be properly and validly taken on appeal under the amended s 49(1).*

[60] In the final analysis, we do not see the JC's award of severance compensation based on 2.5% of the market value as being erroneous in any sense. Whilst the landowners did not succeed in getting a substantial severance compensation based on 50% diminution in land value, there is credible evidence that the presence of the Highway (despite the construction of the Road Over Bridge and Road Under Bridge) would cause some adverse effect to the operation and management of the oil palm plantation and thereby negatively impact the open market value of the remaining unacquired lands.

[61] It is quite untenable in the circumstances for LLM to say that there was no impact on the unacquired remaining lands. Suffice to say that the JC found the impact to be relatively minimal and so awarded 2.5% instead of 50% diminution in value. The private assessor was also of the same view. There was evidence of the Highway having a deleterious effect on the remaining (unacquired) lands and the only issue was the quantification of that impact/effect. The High Court took the view that the impact/effect was minimal and awarded compensation based on 2.5% diminution in value.

[62] The question is — was the award of 2.5% diminution in value contrary to *Dr Murugasu*'s case. We do not think so. In our view, it would be wrong to interpret *Dr Murugasu*'s case as authority for the proposition that in the absence of pre-acquisition and post-acquisition comparable values of the remaining parcels of (unacquired) land, the High Court is precluded from making a minimal award for severance compensation.

[63] From our reading of *Dr Murugasu*'s case, it is clear that, depending on

the facts and circumstances, a landowner who failed to fulfil the 'before-and-after' test, may nevertheless be awarded a minimal award of severance compensation or injurious affection, as the case may be.

[64] Thus, likewise in the present case, the failure on the part of the landowners to fulfil the 'before-and-after' test (per *Murugasu's* case) only means that there can be no award of any substantial damages as severance compensation, but it did not preclude the High Court from evaluating the evidence and undertaking an assessment of the extent of the diminution in value and making a minimal award which the High Court regarded as fair and reasonable in the circumstances to cater for severance compensation.

[65] As such, in the present case, it is our view that the High Court did not err in awarding a minimal amount of severance compensation at 2.5% of the land value, much in the same way that the High Court awarded 5% for injurious affection in *Dr Murugasu*'s case.

[66] The quantum of compensation that was awarded as severance compensation was very much fact based and the award of 2.5% diminution was necessarily predicated on the High Court's appreciation/impression of the evidence adduced and assessment of the loss. In such matters, there is obviously room for a divergence of opinion. In our view, based on the evidence presented to the High Court, it cannot be said that the High Court's award of 2.5% severance compensation was unfair or unreasonable in all the circumstances, or that there was a manifestation of a misdirection such that appellate intervention is warranted.

RESULT

[67] In conclusion, we state that there is no question of law in this appeal which is in substance, an appeal touching on compensation. The appeal is accordingly precluded by the proviso to s 49(1) of the Land Acquisition Act 1960.

[68] As such, for the reasons stated above, the appeal is dismissed with costs of *RM10,000* (subject to allocatur) to the *first and second respondents,* and *RM10,000* to the *third respondent.*

Appeal dismissed.

Reported by Ahmad Ismail Illman Mohd Razali